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Access to Justice Within the Federal Courts—A Ninth Circuit Perspective

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INTRODUCTION

“The Future of Access to Justice” is an ambitious theme for a symposium, and I can think of few higher compliments to Professor Arthur Miller than to say that he spent his career in the steadfast pursuit of it. However, as I sat down to collect my thoughts for this Article, I found myself troubled by some treatment of this topic in the legal academy,¹ in the popular press,² and even in the

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¹ See, e.g., Gene R. Nichol, *The Roberts Court and Access to Justice*, 59 CASE W. RES. L. REV. 821 (2009).

² See, e.g., Adam Liptak, *Democrats Seek Papers to Define Whys of Roberts*, N.Y. TIMES, Sept. 13, 2005, at A1; see also Kenneth Jost, *Roberts Court Closing Courthouse Doors for Many*, JOST ON JUSTICE: LAW & JUSTICE BLOG (Aug. 15, 2011, 8:40 AM), <http://jostonjustice.blogspot.com/2011/08/roberts-court-closing-courthouse-doors.html>.

Congressional Reports.³ All too often, this phrase—what is or should be the highest aspiration of our profession—is taken to mean little more than the ability not just to sue for any perceived slight in the federal courts, but to take that suit all the way to trial.⁴ Any decision by the Supreme Court of the United States, no matter how firmly rooted in the Constitution or in the will of Congress, that is perceived to stand in the way of this goal is decried as “rationing justice” or pursuing a nefarious political agenda.⁵ Because such a view misunderstands both the constitutional role of and the objective realities faced by the federal courts, I write to express why we must reexamine what is necessary to promote true access to justice in the federal courts.

I

DEFINING “ACCESS TO JUSTICE”

First, how to define “Access to Justice.” For example, look at the aftermath of the Supreme Court’s decisions in *Bell Atlantic Corp. v. Twombly*⁶ and *Ashcroft v. Iqbal*.⁷ In each of these cases, the Court was called upon to decide what was meant by the requirement under the *Federal Rules of Civil Procedure* that a plaintiff make “a short and plain statement of the claim showing that the pleader *is entitled to relief*.”⁸ Examining the entitlement language as well as past practice, the Court concluded that while a plaintiff need not show a “probability” of success on the merits, he did need to plead sufficient facts to raise “more than a sheer possibility that a defendant has acted unlawfully.”⁹ On its face, a statement by the Supreme Court that a plaintiff needs to make “more than an unadorned, the-defendant-unlawfully-harmed-me accusation” in order to haul that defendant through the federal court system hardly seems worthy of much

³ *Access to Justice Denied: Ashcroft v. Iqbal: Hearing Before Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on Judiciary*, 111th Cong. (2009) [hereinafter *Iqbal Hearing*].

⁴ *Id.* at 4 (statement of Henry J. Johnson, Jr., Member, H. Comm. on the Judiciary, Subcomm. on the Constitution, Civil Rights, and Civil Liberties).

⁵ See Jost, *supra* note 2. But see Jonathan H. Adler, *Standing Still in the Roberts Court*, 59 CASE W. RES. L. REV. 1061 (2009) (concluding that in the first few years of the Roberts Court, it had *not* tightened considerations of standing).

⁶ 550 U.S. 544 (2007).

⁷ 129 S. Ct. 1937 (2009).

⁸ FED. R. CIV. P. 8(a)(2) (emphasis added).

⁹ *Iqbal*, 129 S. Ct. at 1949.

attention.¹⁰ Most decisions interpreting the Federal Rules go largely unnoticed, even when they deal with pleading standards.¹¹ And I would venture to guess that if we were to ask most Americans, they would expect that in order to put *them* through the expense and trouble that is modern discovery, a prospective plaintiff would need considerably more than that. Indeed, *Iqbal*'s own attorney described the Court's decision as "a detour rather than a roadblock" by "telling us . . . that we need to put a little more meat on the bones of our complaint."¹²

Yet *Twombly* and *Iqbal* ignited a firestorm that within months reached all the way to Congress, the entity with ultimate, if rarely used, authority over the Federal Rules.¹³ Many, it seemed, felt that justice required the 1957 pleading standard that the Supreme Court announced in *Conley v. Gibson*, that is, "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."¹⁴ So Senator Arlen Specter (D-PA) proposed a bill that would overturn the Supreme Court and permanently adopt just such a standard.¹⁵ Hearings were held, and for a rather arcane topic, rhetoric on both sides grew heated. Those in favor accused the Supreme Court of judicial activism designed to "implement this conservative Court's apparent agenda to deny access to the courts to people victimized by corporate or government misconduct."¹⁶ Those opposed asserted that "*Iqbal*'s pleadings were simply so conclusory in nature and so lacking in any specific allegations that to have allowed the case to proceed would have been a travesty of justice."¹⁷

Ultimately, the bill stalled in the face of more pressing issues, but I must confess that I find all of this furor to be somewhat perplexing.

¹⁰ *Id.*

¹¹ After all, how many people remember *Skinner v. Switzer*, 131 S. Ct. 1289 (2011), a case decided just last Term that also interpreted Federal Rule of Civil Procedure 8(a)?

¹² Adam Liptak, *Justices Turn Back Ex-Detainee's Suit Against 2 Officials*, N.Y. TIMES, May 19, 2009, at A16.

¹³ The Supreme Court has authority to proscribe rules of procedure for the federal courts specifically because Congress allowed it, and Congress may override any proposed rule. 28 U.S.C. §§ 2071, 2074 (2006).

¹⁴ *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957).

¹⁵ Notice Pleading Restoration Act of 2009, S. 1504, 111th Cong. (2009).

¹⁶ *Iqbal Hearing*, *supra* note 3, at 2 (statement of Jerrold Nadler, Chairman, H. Comm. on the Judiciary, Subcomm. on the Constitution, Civil Rights, and Civil Liberties).

¹⁷ *Id.* at 3 (statement of F. James Sensenbrenner, Jr., Member, H. Comm. on the Judiciary, Subcomm. on the Constitution, Civil Rights, and Civil Liberties).

First, I remind those who believe that these decisions shut off all access to pursue one's grievances that they are interpretations of a Federal Rule of Civil Procedure. Their only impact is on the federal courts, and as I will discuss below, there are numerous routes that an aggrieved party may pursue.

Second, while I am sure that *Twombly* and *Iqbal* affected cases at the margin, I seriously doubt that the opinions worked, or even could have worked, a fundamental change in federal litigation. After all, the Court's previous pronouncement of the pleading standard in *Conley* was never taken to mean what it actually said. Rule 12(b)(6) would have been a dead letter for half a century if a motion to dismiss could be granted only if it "appear[ed] *beyond doubt* that the plaintiff can prove *no set of facts* in support of his claim that would entitle him to relief."¹⁸ As numerous Rule 12(b)(6) motions to dismiss were in fact granted between 1957 and 2009, that was clearly not the case. According to one recent study, in the two years before *Twombly* was decided, forty-six percent of all motions to dismiss that were filed, were granted.¹⁹ And, according to the Judicial Conference of the United States, while there has been a slight uptick in the number of motions to dismiss filed in the years since *Iqbal*, there has been no increase in the percentage of cases that were terminated by the grant of such a motion.²⁰

Most fundamentally, I find the theory and the rhetoric in this debate to take a distressingly narrow and results-oriented view of what "justice" requires. Indeed, one of the single biggest deficiencies that I see with current discussions on "access to justice" is that commentators throw around emotive terms like "rationing" without

¹⁸ *Conley*, 355 U.S. at 45–46 (emphasis added).

¹⁹ Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 59 AM. U. L. REV. 553, 556 (2010). The time period may skew this metric because by that time, as Professor Miller has argued, courts were already employing a number of procedural mechanisms in order to dispose of cases more expeditiously. See Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 1003–16 (2003). However, it does mean that *Conley* had been severely eroded by the time that the Supreme Court decided *Twombly* and *Iqbal*.

²⁰ JOE S. CECIL ET AL., FED. JUDICIAL CTR., MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM AFTER *IQBAL*: REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES vii (2011); see Hatamyar, *supra* note 19, at 599–600; see also Jonah B. Gelbach, Note, *Locking the Doors to Discovery? Conceptual Challenges in and Empirical Results for Assessing the Effects of Twombly and Iqbal on Access to Discovery*, 121 YALE L.J. (forthcoming 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1957363 (summarizing competing views on the impact of *Iqbal*).

ever stopping to examine what they mean by “justice.”²¹ This is particularly striking given that a lawyer’s craft is so predicated on the precise use of language that the Supreme Court has had to determine such weighty issues as whether a tomato is a “fruit” or a “vegetable,”²² and to define terms as simple as the word “any.”²³ Yet many seem to assume that “access to justice” is self-explanatory and that it means encouraging any individual who perceives himself as aggrieved to present his or her case first to a federal judge and then to a jury of his or her peers.²⁴

At least, according to those favoring a bill to overturn *Iqbal*, “[a]ccess to the courts and the ability for claims to be heard by a judge or jury are fundamental to our system of justice.”²⁵ Plaintiffs, they say, should have “the opportunity to present their case to [a] Federal judge even when they [do] not yet have [a] full set of facts.”²⁶ But because *Iqbal* is implicated only when a claim is facially implausible, we are not actually discussing the plaintiff who does “not yet have a full set of facts.” Instead we are talking about whether a plaintiff should be allowed to force the defendant through the expense of discovery and potentially the risk of trial when they have no actionable facts at all.

While I freely admit that defining justice is not an easy undertaking,²⁷ I simply cannot subscribe to a view that so ignores the

²¹ Cf. Stephen Reinhardt, *Whose Federal Judiciary Is It Anyway?*, 27 LOY. L.A. L. REV. 1 (1993). The only exception that immediately comes to mind is almost twenty years old. See Austin Sarat, *The Litigation Explosion, Access to Justice, and Court Reform: Examining the Critical Assumptions*, 37 RUTGERS L. REV. 319 (1985).

²² *Nix v. Hedden*, 149 U.S. 304, 307 (1893) (identifying the tomato as a vegetable).

²³ *United States v. Gonzales*, 520 U.S. 1, 4 (1997); see also, e.g., *Bailey v. United States*, 516 U.S. 137 (1995).

²⁴ Sarat, *supra* note 21, at 323–24 (listing the three main perceived barriers to justice as the “cost in money and time of litigation,” “the alleged inappropriateness of formal litigation’s adversarial process for a range of problems,” and “the ability and willingness of people to recognize that they possess a legally enforceable right”); see also *Iqbal Hearing*, *supra* note 3; cf. Miller, *supra* note 19.

²⁵ *Iqbal Hearing*, *supra* note 3, at 4 (statement of Henry C. Johnson, Jr., Member, H. Comm. on the Judiciary, Subcomm. on the Constitution, Civil Rights, and Civil Liberties).

²⁶ *Id.*

²⁷ Indeed, that topic has troubled philosophers for millennia. For just a few relatively recent examples, compare JOHN STUART MILL, *UTILITARIANISM* 16, 41 (1863) (defining justice as that which promotes maximum societal happiness), with JOHN RAWLS, *A THEORY OF JUSTICE* (1971) (repudiating Mill and asserting that justice is equality and that inequality is just only if it makes the least fortunate better off), with ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 214 (1974) (noting that Rawls’s theory is internally inconsistent because “denigrating a person’s autonomy and prime responsibility for his

fundamental precept that “[j]ustice . . . is the tolerable accommodation of the conflicting interests of society.”²⁸ I propose a different definition of justice, derived from the most fundamental aspects of the rule of law: access to a neutral arbiter who is both willing and *able* to decide like cases in a like manner based upon rules derived from a legitimate authority.²⁹ Despite the furor that arose the last time a federal judge made a similar remark,³⁰ I somehow suspect the first—the need for a neutral arbiter—is uncontroversial. It is implications of the second—that the rules be derived from a legitimate authority—that is likely to upset many in this debate.³¹ For in a democracy such as ours, the legitimate authority does *not* lie with the attorney prosecuting, or the judge presiding over, any specific piece of institutional reform litigation. It lies with the political branches, particularly with Congress and with the legislatures of individual states.³² Rather than the source of all law and all justice, “judges are citizens upon whom we delegate the responsibility of *interpreting* our laws and applying them to concrete

actions is a risky line to take for a theory that otherwise wishes to buttress the dignity and self-respect of autonomous beings”).

²⁸ Philip Hamburger, *The Great Judge*, LIFE, Nov. 4, 1946, at 116, 122–25. I applaud the proponent of the bill to overturn *Iqbal*, who at least recognized that justice has two sides, *Iqbal Hearing*, *supra* note 3, at 4 (“I believe that it is extremely important that a defendant be given wide latitude for pleading.”) (statement of Henry C. Johnson, Jr., Member, H. Comm. on the Judiciary, Subcomm. on the Constitution, Civil Rights, and Civil Liberties), but given the implications of this bill I fear that it is merely lip service.

²⁹ Cf. Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781, 784, 791 (1989); RONALD DWORKIN, LAW’S EMPIRE 93 (1986) (“Law insists that force not be used or withheld . . . except as licensed or required by individual rights and responsibilities flowing from past political decisions about when collective force is justified.”). Under such a definition, *Iqbal* promotes justice if for no other reason than that it promotes candor, and through candor, consistency. I find it somewhat surprising that there is apparently a debate in the academy regarding the value of candor in judicial decision making. See Micah Schwartzman, Essay, *Judicial Sincerity*, 94 VA. L. REV. 987 (2008). I posit however that there can be little debate that if judges are candid, their decisions will be more consistent, or at least their inconsistencies will be more easily detected and corrected.

³⁰ Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

³¹ For example, Professor Dworkin, whose conception of the rule of law is generally accepted, has argued that judges ought to decide cases based upon their political convictions. DWORKIN, *supra* note 29, at 225–75.

³² Or it lies in constitutional amendment. I would like to remind those who would assert that this is not a viable option that women gained the right to vote without filing a lawsuit. As such, the question is why, if the majority of Americans are not willing to provide a particular federal right, it is legitimate for federal judges to overrule those wishes based on their own preferences. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16–17 (1986).

disputes. But if interpretation means whatever judges want it to mean, then the purpose behind this delegation of responsibility is defeated.”³³ As such, I reject the notion proposed by many today that to promote access to justice, I must, or even should, promote my subjective view of what would be more “fair.”³⁴ Instead, my duty in promoting true access to justice is to do everything within my power to enforce consistently the law as it is, not as I might wish it to be.

I admit that this view is far from novel. Indeed, Alexander Hamilton once said that “[t]o avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point their duty in every particular case.”³⁵ Nor is it free from manipulation for it requires a conception of which cases are truly “alike.”³⁶ But as I describe more fully below, acting as such a neutral arbiter is precisely the role that federal courts were designed to play; and as they are currently arranged, it is at times more than they practically can manage.

II

A CONSTITUTIONAL QUANDARY: LIMITED JURISDICTION V. LIMITLESS EXPECTATIONS

The federal courts simply were not constitutionally designed to shoulder the burdens now placed upon them. That there would be some sort of federal judiciary was never a matter of serious debate because “[t]he mere necessity of uniformity in the interpretation of the national laws, decide[d] the question.”³⁷ The precise sequence of events that led to the so-called “Madisonian Compromise” that is the current language of Article III has been the topic of much scholarly attention and is far beyond the scope of this Article.³⁸ Suffice it to

³³ Diarmuid F. O’Sconnlain, *Judging and Democracy*, 89 KY. L.J. 563, 566 (2001).

³⁴ See generally Nichol, *supra* note 1.

³⁵ THE FEDERALIST NO. 78, at 430 (Alexander Hamilton) (E.H. Scott ed., 1898).

³⁶ By limiting it to “cases,” I recognize that this definition also creates something of a bias against those who do not or cannot sue, but that is an unavoidable consequence of Article III, section 2. Cf. *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 598 (2007) (“The federal courts are not empowered to seek out and strike down any governmental act that they deem to be repugnant to the Constitution. Rather, federal courts sit ‘solely, to decide on the rights of individuals.’” (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803))).

³⁷ THE FEDERALIST NO. 80, *supra* note 35, at 435 (Alexander Hamilton).

³⁸ See, e.g., Anthony J. Bellia, Jr., *The Origins of Article III “Arising Under” Jurisdiction*, 57 DUKE L.J. 263, 293–317 (2007); Robert N. Clinton, *A Mandatory View of*

say that while there was considerable controversy over the extent of such judiciary's jurisdiction, some points relevant to this debate are completely clear.

First, the Framers did not deem the ability to present one's grievances to a federal judge to be an absolute prerequisite to achieve justice. While the Constitution places certain kinds of cases within the "judicial power of the United States,"³⁹ it did not create courts with original jurisdiction to hear everyday suits by Americans. The only federal tribunal mentioned in Article III is the Supreme Court, whose original jurisdiction was very limited.⁴⁰ Indeed, the only way an American could bring suit in federal court in the very early days of the Republic was to sue a sovereign state or an ambassador.⁴¹

Second, the federal courts were *not* empowered to take the sorts of steps that many commentators insist are necessary to promote equal access to justice, for example, recognizing a right to counsel in civil cases.⁴² Article I of the Constitution gives "All legislative Powers herein granted" to Congress. While there may be debate at the margins about what constitutes a "legislative power,"⁴³ it includes at least the power to "command[] the purse" and to "prescribe[] the rules by which the duties and rights of every citizen are to be regulated."⁴⁴ It was for this reason that Hamilton made that now famous statement that "the Judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them."⁴⁵

Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III, 132 U. PA. L. REV. 741, 757–96 (1983).

³⁹ U.S. CONST. art. III, § 1.

⁴⁰ See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

⁴¹ U.S. CONST. art. III, § 2 ("In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction.").

⁴² See Nichol, *supra* note 1; cf. Brennan Center, *Civil Right to Counsel*, http://brennancenter.org/content/section/category/civil_right_to_counsel (last accessed Mar. 7, 2012).

⁴³ See, e.g., *Bowsher v. Synar*, 478 U.S. 714, 751 (1986) (Stevens & Marshall, JJ., concurring) ("Under . . . the analysis adopted by the majority today, it would therefore appear that the function at issue is 'executive' if performed by the Comptroller General but 'legislative' if performed by Congress." (alluding to *Buckley v. Valeo*, 424 U.S. 1, 126, 137 (1976))).

⁴⁴ THE FEDERALIST NO. 78, *supra* note 35, at 425 (Alexander Hamilton).

⁴⁵ *Id.*

Instead, the courts were designed to serve a far more limited purpose: maintaining a uniform interpretation of federal law.⁴⁶ Federal judges were provided with the minimum amount of authority deemed necessary to achieve that purpose.⁴⁷ And still there were those who thought that federal judges were given too much power. For example, Brutus (likely Robert Yates) warned—quite presciently it seems—that the natural tendencies of those in office to be “tenacious of power” would “operate strongly upon the courts to give such a meaning to the constitution in all cases where it can possibly be done, as will enlarge the sphere of their own authority.”⁴⁸ And far from creating the greatest possibility of justice, eighteenth-century defenders of the common man considered such an expansion likely to “absorb and destroy the judiciaries of the several States; thereby rendering law as tedious, intricate and expensive, and justice as unattainable, by a great part of the community, as in England, and enabling the rich to oppress and ruin the poor.”⁴⁹

Such a skeptical view of the federal courts continued throughout the Founding period. Indeed, the same fears drove the drafters of the Judiciary Act of 1789 to include a relatively high amount in controversy requirement and to establish concurrent jurisdiction between the federal and the state courts over issues of federal law.⁵⁰ One of the reasons that the Democratic-Republicans so disliked the Judiciary Act of 1801 was that it extended the federal judiciary to “correct[] genuine defects in the organization of the federal judicial system which many responsible leaders had recognized for years,” specifically by providing access to the federal courts in the South and West.⁵¹ Again, rather than seeing this as promoting justice for private

⁴⁶ *Id.*; see also THE FEDERALIST NO. 80, *supra* note 35, at 435 (Alexander Hamilton) (stating that federal courts were necessary because “[t]hirteen independent courts of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government, from which nothing but contradiction and confusion can proceed”).

⁴⁷ THE FEDERALIST NO. 78, *supra* note 35, at 425 (Alexander Hamilton).

⁴⁸ Brutus XI, N.Y. J., Jan. 31, 1788, reprinted in 2 THE COMPLETE ANTI-FEDERALIST 421 (Herbert J. Storing ed., 1981).

⁴⁹ 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 638 (Max Farrand ed., rev. ed. 1937) [hereinafter RECORDS].

⁵⁰ See Maeva Marcus & Natalie Wexler, *The Judiciary Act of 1789: Political Compromise or Constitutional Interpretation?*, in ORIGINS OF THE FEDERAL JUDICIARY: ESSAYS ON THE JUDICIARY ACT OF 1789, at 13 (Maeva Marcus ed., 1992); see also Letter from Gouverneur Morris to Timothy Pickering, Dec. 22, 1814, in 3 RECORDS, *supra* note 49, at 419, 420 (discussing the need for ambiguity in the language of Article III).

⁵¹ DUMAS MALONE, JEFFERSON THE PRESIDENT: FIRST TERM, 1801–1805, at 113 (1970); accord *id.* at 113–14; see also Judiciary Act of 1801, ch. 4, 2 Stat. 89 (1801).

citizens, the party of Thomas Jefferson “viewed the judges as . . . agents of tyranny”; it was the Federalists who “believed that the unpopularity of the judiciary was a sure sign that it was meritoriously performing its major function, *checking the excesses of the populace*.”⁵²

This state of affairs, both in terms of perception and structure, persisted at least through the Civil War,⁵³ and probably considerably longer than that. Even after the passage of the Fourteenth Amendment, the Court refused to assume for itself the role as “a perpetual censor upon all legislation of the States, on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights.”⁵⁴ As late as the 1940s, the Court routinely treated the States as the primary protector of the rights of their citizens, routinely refusing to enforce the Bill of Rights against the States.⁵⁵ The one exception was the Court’s failed attempt to federalize certain economic rights under *Lochner v. New York*,⁵⁶ leading to a series of inconsistent cases that have been roundly condemned as inappropriate attempts to promote a particular social policy.⁵⁷ The courts did not attempt again to step into the role of recognizing new rights, either statutory or constitutional, until the 1960s.

In the interim, there had been significant legislative steps toward federalization starting with Prohibition⁵⁸ and the New Deal.⁵⁹

⁵² MALONE, *supra* note 51, at 114 (emphasis added).

⁵³ See, e.g., CARY FEDERMAN, *THE BODY AND THE STATE: HABEAS CORPUS AND AMERICAN JURISPRUDENCE* ix (2006) (discussing the gradual expansion of federal habeas relief); PAUL FINKELMAN, *AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY* 236–37 (2000) (discussing the perception of federal courts after a number of pro-slavery decisions).

⁵⁴ *Slaughter-House Cases*, 83 U.S. 36 (1872); see also ROBERT J. KACZOROWSKI, *THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE AND CIVIL RIGHTS, 1866–1876* 154–55 (1985).

⁵⁵ *Adamson v. California*, 332 U.S. 46 (1947) (holding that the Fourteenth Amendment does not apply the Fifth Amendment right against self-incrimination against the States); *Palko v. Connecticut*, 302 U.S. 319 (1937) (double jeopardy); *Twining v. New Jersey*, 211 U.S. 78 (1908); *United States v. Cruikshank*, 92 U.S. 542 (1875) (freedom of assembly). But see *Chicago, Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226 (1897) (takings clause).

⁵⁶ 198 U.S. 45 (1905).

⁵⁷ For a review of the evolving view of *Lochner* and its progeny, see generally Barry Cushman, *Some Varieties and Vicissitudes of Lochnerism*, 85 B.U.L. REV. 881 (2005).

⁵⁸ See RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 55 (1996).

⁵⁹ See, e.g., *Wickard v. Filburn*, 317 U.S. 111 (1942).

Congress, however, really energized federal litigation in the 1960s and 1970s. As Professor Miller once commented, during this period, Congress “seemed to be operating a ‘new-right-of-the-month club.’ . . . The same societal forces that fueled the civil rights movement also impelled Congress to respond to other demands for justice, and new statutory rights of action became available in the environmental, consumer, political rights, and safety fields,”⁶⁰ areas which previously had been considered the sole province of the police power of the States.

These same societal forces also took hold of the courts as Americans (or at least American lawyers) began to develop the view that the federal courts were the first, last, and only bastions of justice. Seeing gaps in the enforcement scheme created by Congress or by the Constitution, lawyers would argue that the courts should step into the void. And the courts readily complied.⁶¹ The Supreme Court also incorporated rights against the states that it had previously denied,⁶² and invented a number of entirely new rights,⁶³ all of which could be

⁶⁰ Arthur R. Miller, *The Adversary System: Dinosaur or Phoenix*, 69 MINN. L. REV. 1, 5–6 (1984) (“The sensitivity of courts in recent years . . . has generated a myriad of cases involving a kaleidoscopic range of matters that were not within the standard litigation repertoire twenty-five years ago—dress and hair codes, academic and government employment status, prisoners’ rights, and welfare benefits . . . reflect[ing] the revolution in thinking about entitlements and private rights that raged in the courts and law reviews during the late 1960’s.”).

⁶¹ See, e.g., *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971); *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964). In a related phenomenon, even when the Court refused to find a cause of action in a particular federal statute, the Court would often allow enforcement (at least against certain public officials and entities) through 42 U.S.C. § 1983. See Wayne McCormack, *Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Protections, Part 1*, 60 VA. L. REV. 1 (1974) (describing how the number of § 1983 suits jumped from 300 in 1960 to 8000 in 1972); see also Tamar Frankel, *Implied Rights of Action*, 67 VA. L. REV. 553, 559–60 (1981). For a typical defense of this sort of judicial legislation, see Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193 (1982).

⁶² See *Malloy v. Hogan*, 378 U.S. 1 (1964) (overturning *Twining v. New Jersey*, 211 U.S. 78 (1908) and *Adamson v. California*, 332 U.S. 46 (1947), to enforce the Fifth Amendment right against self-incrimination against the States); see also *Benton v. Maryland*, 395 U.S. 784 (1969) (overruling *Palko v. Connecticut*, 302 U.S. 319 (1937)); *Mapp v. Ohio*, 367 U.S. 643 (1961) (overruling *Wolf v. Colorado*, 338 U.S. 25 (1949), to incorporate the exclusionary rule against the States). There had been certain moves toward incorporating the First Amendment against the States starting in the 1920s and 1930s. See, e.g., *Gitlow v. New York*, 268 U.S. 652 (1925) (enforcing the First Amendment against the States). This move also continued in the 1960s, see *Edwards v. South Carolina*, 372 U.S. 229 (1963), as did the general move toward complete incorporation of the Bill of Rights, see, e.g., *Duncan v. Louisiana*, 391 U.S. 145 (1968).

⁶³ See *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

enforced in the courts either through habeas or through these newly discovered private rights of action. Though all of this constituted blatant steps by the federal courts to expand their own jurisdiction, there was relatively little backlash, all because of the increasing number of adherents to the view that federal courts could, and indeed should, resolve a society's ills.

Though this development started with Congress, ultimately its effect on the democratically elected branches of the American system has been far from salutary. In the 1780s, America's political leaders were expected to determine for themselves the limits of their own power and to stay within them.⁶⁴ But as early as the New Deal, when the Court showed itself more willing to overturn congressional legislation, the President was openly encouraging the Congress to abdicate that constitutional duty.⁶⁵ And as the courts showed themselves more and more willing to legislate from the bench, Congress simply found "a way to legislate that pushes tough political problems onto [the courts]."⁶⁶ This sort of "let the courts figure it out" attitude does not promote the sort of reasoned discussion and compromise we expect from our elected leaders. Indeed, it encourages them to stand to the side so that they may praise any popular court ruling as "promoting justice" and criticize any unpopular one as "judicial activism."

As such, the impact on the courts was anything but salubrious. The recognition of unenumerated rights not only caused criticism in

⁶⁴ This concept is almost entirely foreign to modern Americans, but it was an argument for why creating a judiciary that was perceived of as too powerful was unnecessary as well as dangerous. Cf. THE FEDERALIST NO. 78, *supra* note 35, at 426–27 (Alexander Hamilton) ("If it be said that the Legislative body are themselves the Constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered, that this cannot be the natural presumption, where it is not to be collected from any particular provisions in the Constitution."). And ultimately, it is an option that was foreclosed not by the language of the Constitution but by the Court's decision in *Marbury*. William W. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1, 22–27 (1969).

⁶⁵ Van Alstyne, *supra* note 64, at 19 (noting that the "tend[ency] to encourage congressional indifference of constitutionality . . . was utilized by President Roosevelt when he urged a House subcommittee chairman to resolve all constitutional doubts about a given bill in favor of the bill, 'leaving to the courts, in an orderly fashion, the ultimate question of constitutionality'" (quoting 4 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN DELANO ROOSEVELT 297–98 (1938))).

⁶⁶ John G. Kester, *Are Lawyers Becoming Public Enemy Number One?*, WASHINGTONIAN, Feb. 1984, at 114, 115.

certain quarters for overstepping judicial authority,⁶⁷ it “encouraged the emergence of class actions based on conceptions of corporate democracy, consumer rights, competitive behavior, and environmental protection” that flooded the system with cases the courts were simply not designed to handle.⁶⁸ For not only has it increased the number of cases in the system, “[t]he characteristic features of [this] public law model are very different from those of the traditional model.”⁶⁹ The cases tend to involve large and ever-shifting numbers of parties, and “the trial judge has increasingly become the creator and manager of complex forms of ongoing relief” that “require the judge’s continuing involvement”⁷⁰ and that more closely resemble complicated series of administrative regulations than the injunctions of old. Thus the federal judge became both the creator and the interpreter of any number of social policies, roles that the Founders explicitly gave to different bodies both for the protection of individual liberty and for concerns about institutional capacity.⁷¹

Fortunately, in the last few years, an increasing number of lawyers and judges have acknowledged that so drastically departing from the scheme designed by the Framers was folly. Legislation through litigation is not only expensive, it decreases the legitimacy of the final decision and might in some ways even be harmful to those individuals the litigation seeks to help.⁷² There are still those who believe that anything less than full access to the federal courts for the purposes of pursuing such an agenda is an attempt to ration justice. But, as I will discuss in Part III, practicality also mandates that we cannot continue

⁶⁷ The most obvious example of this is the controversy surrounding *Roe v. Wade*, 410 U.S. 113 (1973), that grew to such an extent that the majority opinion in *Casey v. Planned Parenthood* made the highly unusual, if not unprecedented, step of commenting on it. 505 U.S. 833, 867 (1992) (noting the extent of the “national controversy” and stating that “to overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court’s legitimacy beyond any serious question”); *see also id.* at 1000 (Scalia, J., dissenting) (noting that the political pressure was the Court’s own fault because so long as the “Justices were doing essentially lawyers’ work up here—reading text and discerning our society’s traditional understanding of that text—the public pretty much left us alone”).

⁶⁸ Miller, *supra* note 60, at 6.

⁶⁹ Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284 (1976).

⁷⁰ *Id.*

⁷¹ THE FEDERALIST NO. 78, *supra* note 35, at 425 (Alexander Hamilton).

⁷² Cf. Michael J. Klarman, Brown, *Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 97–118 (1994) (announcing a theory that, at least in the short term, *Brown v. Board of Education* served to harden social repression in the South).

on the path started in the 1960s if we are going to promote justice through the consistent application of the rule of law in federal courts.

III

A PRACTICAL PROBLEM: LIMITED CAPACITY V. LIMITLESS LITIGATION

Put simply, despite having the incentive and the tendency to punt difficult questions to the federal courts, Congress has not provided those tribunals with the resources to handle the load. To be fair, as I will discuss below, I doubt simply throwing more resources at the courts would solve the problems they face today. But the stark reality is that Congress has not undertaken a serious, systematic restructuring of the federal court system since the Industrial Revolution—before Prohibition, the rise of the Administrative State, and the era of implied rights of action. The inevitable result has been the overtaxing of the system, and it is time to reconsider the assumption that more federal cases equates to more access to justice, more consistent application of federal law, or even better treatment in any given case.

The structure of the federal courts has not changed much since shortly before the turn of the twentieth century. For the first hundred years of the federal judiciary, there was no intermediate court of appeals.⁷³ What were then known as circuit courts, which were composed of one district court judge and two Supreme Court Justices (later reduced to only one Justice), “had some appellate jurisdiction over the district courts, [but] they were mainly trial courts themselves.”⁷⁴ The only true appellate court was thus the Supreme Court. However, the Industrial Revolution, with its vast effects on the demography of our nation, made that system no longer workable, causing the Congress in 1891 to pass the Evarts Act and to create the three-tier judicial system with which we are now familiar.⁷⁵ Since that time, the number of geographical circuits and the number of federal judgeships have increased, but the structure itself has remained relatively static.⁷⁶ And for about half a century, the system worked quite well.

⁷³ See POSNER, *supra* note 58, at 4–5.

⁷⁴ *Id.* at 4; see also Act of Apr. 29, 1802, ch. 31, 2 Stat. 156 (1802); Judiciary Act of 1789, 1 Stat. 73, § 4 (1789) (establishing that any two of these judges would constitute a quorum and providing that the district judge could not sit on appeal of his own case).

⁷⁵ Act of Mar. 3, 1891, ch. 517, 26 Stat. 826 (1891).

⁷⁶ POSNER, *supra* note 58, at 5–9; JAMES C. DUFF, ADMIN. OFFICE OF THE U.S. CTS., 2010 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES

Then came the Federalization Revolution of the 1960s, spawning a spike in caseloads in the federal courts that cannot be described as anything other than dramatic. Between 1960 and 1983, the number of cases filed in the district courts increased by over 330%, and the number of appeals filed increased by 686%.⁷⁷ Now, as Professor Miller once noted, “To the extent that the courts have leant a sympathetic ear to new theories of entitlement and liability and have been unwilling to terminate cases prior to trial, their bloated dockets represent[ed], in a sense, a self-inflicted wound.”⁷⁸ Nonetheless, the cases were there, and the courts needed to address them somehow. As no one doubted either that this docket explosion had led to lengthy delays in the processing of individual cases—reviewing the old adage that justice delayed is all too often justice denied—the debate became how they should best proceed.

There were those who felt that all that needed to be done was for the courts themselves to work harder and smarter than they had in the past.⁷⁹ To a certain extent, I agree that that was at least a temporary solution to the docket problem. In 1973, Chief Justice Burger noted that “we were still clinging far too much to practices, procedures, and attitudes that . . . were already obsolete at the beginning of this century.”⁸⁰ And within a couple of years, numerous academics made suggestions on how the courts, particularly the court of appeals, could modernize.⁸¹ Many of those suggestions—for example, the increased use of a centralized staff—were quickly adopted.

But the backlog continued to grow. By the late 1980s or early 1990s, we had “reached, [if not] passed, the point where the increase

COURTS (2011), available at <http://www.uscourts.gov/uscourts/FederalCourts/AnnualReport/2010/images/annualReport2010.pdf>. This actually dramatically overstates the strength of the federal judiciary, which has had a chronic problem of understaffing for years. See, e.g., JOHN G. ROBERTS, JR., 2010 YEAR-END REPORT ON THE FEDERAL JUDICIARY (2010), available at <http://www.supremecourt.gov/publicinfo/year-end/2010-year-endreport.pdf>. As a result, due to the number of vacancies, at the end of 2010, there were closer to eight hundred active judges, causing us to rely with increasing regularity on judges with Senior Status (a sort of semiretirement judges may take when the sum of their age and their years on the bench is eighty).

⁷⁷ POSNER, *supra* note 58, at 59. See generally David S. Clark, *Adjudication to Administration: A Statistical Analysis of Federal District Courts in the Twentieth Century*, 55 S. CALIF. L. REV. 65 (1981).

⁷⁸ Miller, *supra* note 60, at 6.

⁷⁹ See, e.g., Miller, *supra* note 19, at 987–95 (citing a study by the National Center for State Courts showing stable filings between 1985 and 2000).

⁸⁰ Warren E. Burger, *Annual Report on the State of Justice*, in DELIVERY OF JUSTICE: PROPOSALS FOR CHANGES TO IMPROVE THE ADMINISTRATION OF JUSTICE 84, 84 (1990).

⁸¹ See, e.g., PAUL D. CARRINGTON ET AL., JUSTICE ON APPEAL 13–43 (1976).

in federal court cases pose[d] a serious and substantial risk to the nature and quality of the federal judicial system,”⁸² and therefore the justice it dispenses. Yet the increase continued, particularly at the appellate level. “A series of commissions, committees, study groups, conferences, and symposia predicted that the rapidly increasing number of cases was about to overwhelm the federal appellate court system and that only radical structural reforms could save it.”⁸³ Calls for reform came from all sides of the political spectrum. Judge Stephen Reinhardt of my own circuit argued that it would be necessary to double the size of the courts of appeals just to keep up with the growth.⁸⁴ Chief Justice Rehnquist warned that “[a]n era of austerity will require changes in the way the judiciary does its internal business. It will also require changes in the habits and expectations of professional users of the system—lawyers and judges whose habits and expectations were developed when the system was under far less pressure.”⁸⁵

Still nothing changed, and twenty years later, the federal courts have survived. The naysayers seem to have been proven correct. “[T]oday the courts of appeals are not hopelessly backlogged. There is no panicky sense of being overwhelmed. Everything seems to be ‘business as usual,’ at least on the surface.”⁸⁶ As a result, the concept of the “crisis of volume” has receded from the public consciousness. However, I suggest that the calm is really a chimera. Rather than being able to assimilate those changes in caseload, just to keep their heads above water, the federal courts have been forced to rely increasingly on procedural mechanisms that were already raising

⁸² John O. Newman, *Restructuring Federal Jurisdiction: Proposals to Preserve the Federal Judicial System*, 56 U. CHI. L. REV. 761, 762–63 (1989).

⁸³ Thomas E. Baker, *Applied Freakonomics: Explaining the “Crisis of Volume,”* 8 J. APP. PRAC. & PROCESS 101, 102 (2006).

⁸⁴ Stephen Reinhardt, *Too Few Judges, Too Many Cases: A Plea to Save the Federal Courts*, 79 A.B.A. J. 52, 53 (1993). As was immediately recognized, and as I will discuss below, there are both practical and jurisprudential problems with such a proposal. See Gerald Bard Tjoflat, *More Judges, Less Justice: The Case Against Expansion of the Federal Judiciary*, 79 A.B.A. J. 70 (1993) (explaining that the creation of such jumbo courts would harm both the productivity of individual judges and the clarity and stability of the circuit’s law, creating incentives to litigate).

⁸⁵ William H. Rehnquist, *1993 Year-End Report on the Federal Judiciary*, 17 AM. J. TRIAL ADVOC. 571, 571 (1994).

⁸⁶ Baker, *supra* note 83, at 102.

concerns about their effects on the quality of federal justice as early as 1973.⁸⁷

Though the legal “discipline [at least occasionally] recognizes that organizational structure and process may affect outcomes,”⁸⁸ relatively little attention has been paid to the structural changes made to courts such as mine over the last thirty years. One notable exception is the increased use of unpublished opinions, which excited a great deal of interest among law professors.⁸⁹ These dispositions are short, recite no facts, give very little analysis, and before Federal Rule of Appellate Procedure 32.1 were often completely unciteable. That these were not considered precedent caused many to complain that we judges were shirking our responsibility and hiding our agendas behind a veil of unaccountability.⁹⁰ Frankly, I do not find this criticism to be particularly persuasive. As can easily be seen by the record of my own court, a judge who wishes to pursue his own agenda outside the bounds of congressional statute or the Constitution may and will do so regardless of whether his or her opinion is published.⁹¹ Indeed unpublished dispositions are a highly inefficient method of promoting such a personal agenda because while it may or may not allow a judge to pursue those goals in a particular case, it does not bind future panels as would a published decision.⁹²

What I consider to be the more important critique comes from the method in which the vast majority of these dispositions are created. As a relatively recent article has quite colorfully described, we have in a sense created “two separate and unequal tracks by which cases are considered and resolved in our federal appellate courts,”⁹³ the

⁸⁷ Burger, *supra* note 80, at 87 (“With the enormous pressures on Courts of Appeals, there is risk that, in a screening process, some non-frivolous appeals having arguable merit may be denied oral argument . . .”).

⁸⁸ See Robert A. Katzmann & Michael Tonry, *The Crisis of Volume and Judicial Administration*, in *MANAGING APPEALS IN FEDERAL COURTS* 1, 4 (Robert A. Katzmann & Michael Tonry eds., 1988).

⁸⁹ See generally Patrick J. Schiltz, *Much Ado About Little: Explaining the Sturm und Drang Over the Citation of Unpublished Opinions*, 62 WASH. & LEE L. REV. 1429 (2005).

⁹⁰ *Id.* at 1468.

⁹¹ For more information about the Ninth Circuit’s record of doing precisely that, see Diarmuid F. O’Scainnlain, *A Decade of Reversals: The Ninth Circuit’s Record in the Supreme Court Since October Term 2000*, 14 LEWIS & CLARK L. REV. 1557 (2010).

⁹² An unpublished decision is perhaps less likely to attract attention from an en banc court, but if all unpublished dispositions were in fact published, there would be so many published opinions that it would be unlikely that any given one would be more likely to attract such attention.

⁹³ David C. Vladeck & Mitu Gulati, *Judicial Triage: Reflections on the Debate over Unpublished Opinions*, 62 WASH. & LEE L. REV. 1667, 1668 (2005).

“Learned Hand” track and the “black box” track.⁹⁴ The “Learned Hand” track is the method traditionally associated with federal appellate courts: cases are assigned to three-judge panels, oral argument is held, and a well-reasoned opinion setting precedent for future cases is authored.⁹⁵ But as currently constituted, it is simply unrealistic to expect such treatment for every case filed in the federal courts of appeals. In the year ending June 30, 2011, about twelve thousand appeals were filed in the Ninth Circuit alone.⁹⁶ Even if my circuit had its full complement of twenty-nine judges and even with almost as many senior judges, it is simply not possible for us to give such attention to every single one of those cases.

As such, we are left with the “black box” method. Indeed, as I have described in more detail elsewhere, by my count fewer than one-sixth of the cases filed in the Ninth Circuit are decided in the “Learned Hand” track.⁹⁷ Half are dismissed for some form of procedural default.⁹⁸ About two-thirds of the remaining cases are assigned to an oral argument calendar, but anywhere from one-quarter to one-half of these cases still will not see oral argument because the panel may decide to submit the case on the briefs.⁹⁹ The other third (about one-sixth of the total) are assigned to one of a number of “screening panels,” where three judges will spend on average less than ten minutes per case and are thus largely dependent on the representations of staff attorneys who prepare a proposed memorandum disposition in advance. Though we retain the power to “kick” a case to an oral argument panel, in the first five months of 2009, we agreed with the staff attorneys’ recommendations perhaps ninety-five percent of the time.¹⁰⁰ A recent article published in the *Duke Law Journal* confirms that all other circuits have similar mechanisms.¹⁰¹ This includes the Second Circuit, which was the last

⁹⁴ *Id.*

⁹⁵ *Id.* at 1668–69.

⁹⁶ See Administrative Office of the U.S. Courts, *U.S. Court of Appeals—Judicial Case Load Profile* (on file with author); DUFF, *supra* note 76, at tbl.B-1.

⁹⁷ Diarmuid F. O’Scannlain, *Striking a Devil’s Bargain: The Federal Courts and Expanding Case Loads in the Twenty-First Century*, 13 LEWIS & CLARK L. REV. 473, 474–77 (2009).

⁹⁸ *Id.* at 476 (citing Ninth Circuit General Order 6.2(a) (2008), [http://www.ca9.uscourts.gov/rules/General Orders/General Orders.pdf](http://www.ca9.uscourts.gov/rules/General%20Orders/General%20Orders.pdf)).

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ Marin K. Levy, *The Mechanics of Federal Appeals: Uniformity and Case Management in the Circuit Courts*, 61 DUKE L.J. 315 (2011); see also David R. Stras &

to hold onto the notion that every litigant should receive oral argument, and the D.C. Circuit, which has the lowest caseload of any circuit in the country.¹⁰² The circuits vary as to the types of cases that are sent to such screening panels, but immigration cases are common to all of them.¹⁰³ Other popular types of cases assigned to such panels are Social Security appeals, *Anders* brief appeals,¹⁰⁴ and appeals that are submitted pro se.¹⁰⁵ From personal experience, I can say that the Ninth Circuit practice is similar.¹⁰⁶

This method of handling cases can have negative implications on justice in several ways. First, such cursory review can lead to mistakes simply because there is little time to review the work performed by the staff attorneys. Second, though all cases are equally important to the individuals involved, we treat some cases as more procedurally equal than others. Third, there is the potential for one badly chosen test case to create a bad rule that will be very difficult to correct. Nominally speaking, cases are assigned to screening panels because the law is clear, requiring only its application to the facts. In my circuit, this not uncommonly means that staff in San Francisco will identify one of any number of similar cases to receive full “Learned Hand” treatment and hold the others to be resolved on screening. This creates considerable path dependence and puts considerable pressure on the selection of the proper case when there is very limited information. If for whatever reason an error is not caught in that initial case, it is unlikely to be corrected for quite some period of time because a memorandum disposition based on a previously decided case is rarely reheard en banc. And while the

Shaun M. Pettigrew, *The Rising Caseload in the Fourth Circuit: A Statistical and Institutional Analysis*, 61 S.C. L. REV. 421 (2010).

¹⁰² Compared to the approximately twelve thousand cases filed in the Ninth Circuit in the fiscal year 2010, fewer than twelve hundred were filed in the D.C. Circuit. DUFF, *supra* note 76, at tbl.B-1. The next-largest circuit, the First, received 1530 new filings, *id.*, and it too requires a screening process, Levy, *supra* note 101, at 335.

¹⁰³ Levy, *supra* note 101, at 333–38.

¹⁰⁴ Appointed counsel who wish to avoid filing a frivolous appeal, file instead a brief, named after *Anders v. California*, “referring to anything in the record that might arguably support the appeal.” 386 U.S. 738, 744 (1967).

¹⁰⁵ Levy, *supra* note 101, at 333–38.

¹⁰⁶ Though the Eleventh Circuit was not included in this study, its methods are likely quite similar given that it has made the conscious choice not to request additional judges despite having over eight hundred cases per active judge. Arthur D. Hellman, *Assessing Judgeship Needs in the Federal Courts of Appeals: Policy Choices and Process Concerns*, 5 J. APP. PRAC. AND PROCESS 239, 255 (2003) (questioning the appropriateness of such a decision given the impact beyond the judges themselves).

Supreme Court occasionally grants a writ of certiorari in these cases,¹⁰⁷ it is even more rare.

The reader may recognize these problems as part of the umbrella issue of agency costs and the practice of delegation.¹⁰⁸ Indeed, there is a common critique among professors who examine modern appellate practices that the quality of appellate opinions has decreased because judges are unable to supervise all of our staff and that we spend more time managing our law clerks than crafting our opinions.¹⁰⁹ The problems of delegation become particularly acute when judges “delegate [their en banc monitoring duties] to law clerks who have only cursory and incidental knowledge of the circuit’s law.”¹¹⁰ However, with so many cases, it would simply not be possible to function with a smaller staff without returning to the days when it took years to decide cases, which would similarly have an adverse impact on justice.

And according to recent research, eliminating delegation would not necessarily lead to better-reasoned decisions due to a phenomenon known as decision fatigue.¹¹¹ Basically, as individuals make a series of choices, they become more likely to rely on intuition, however faulty, because they lack the mental energy to overcome their initial intuitive reactions.¹¹² First developed in the realm of marketing, this theory has recently been examined in the context of judicial decision making with troubling results. In 2011, three professors looked at the decisions of a group of Israeli judges who were asked to make a series of parole decisions on a single day.¹¹³ Without attempting to determine if any given decision was “right,” but controlling for other factors ranging from the severity of the offense to the personal characteristics of the offender, the researchers concluded “that the likelihood of a favorable ruling is greater at the very beginning of the

¹⁰⁷ There have been several such grants in this Term, at least one of which involved a screening panel applying the clear law of the circuit. *Gutierrez v. Holder*, 411 F. App’x 121 (9th Cir. 2011), *cert. granted*, 132 S. Ct. 71 (2011).

¹⁰⁸ POSNER, *supra* note 58, at 139–57; *see also* Nicolai J. Foss et al., *The Theory of the Firm*, in 1 *ENCYCLOPEDIA OF LAW AND ECONOMICS* 631 (Boudewijn Bouckaert & Gerrit De Geest eds., 2000) (discussing the issue of agency costs as applied to firms).

¹⁰⁹ *See, e.g.*, Penelope Pether, *Sorcerers, Not Apprentices: How Judicial Clerks and Staff Attorneys Impoverish U.S. Law*, 39 ARIZ. ST. L.J. 1 (2007).

¹¹⁰ Tjoflat, *supra* note 84, at 72.

¹¹¹ *See, e.g.*, Anastasiya Pocheptsova et al., *Deciding Without Resources: Resource Depletion and Choice in Context*, 46 J. MARKETING RES. 344 (2009).

¹¹² *Id.*

¹¹³ Shai Danziger et al., *Extraneous Factors in Judicial Decisions*, 108 PROC. NAT’L ACAD. SCI. 6889 (2011).

work day or after a food break than later in the sequence of cases.”¹¹⁴ That is, this study confirms what previous studies had suggested—that as judges make more decisions in a row, they are more likely to be swayed by external referents such as the status quo.¹¹⁵ According to another study conducted on a different set of judges, this tendency is heightened when—as may often be the case in screening situations—the judge perceives the question before him or her as easy and not requiring much deliberation.¹¹⁶

Though these studies do not specifically deal with the issue, I also suspect that this problem of decision fatigue is only further exacerbated by a judge’s other duties. In addition to deciding cases, judges today take on roles “in an elaborate administrative structure within their individual courts, their judicial councils, and the committees of the United States Judicial Conference.”¹¹⁷ We are also tasked with monitoring cases in our own circuit to avoid intra-circuit discrepancies, those in other circuits to avoid inter-circuit conflict, and those in the Supreme Court to avoid ultra vires action. As such, we are always making myriad decisions, depleting the mental resources necessary to override the intuitive reasoning that may lead us astray.

As could probably be surmised from my brief description of the courts’ history above, with the exception of the Eleventh Circuit which has consciously chosen to stay small despite a ballooning docket,¹¹⁸ the nearly universal response to this dilemma has been to add more judges.¹¹⁹ While this option is certainly preferable to keeping the status quo, it is unlikely to be the solution to our problem of how to provide quality justice in all cases that come before us. As a practical matter, such a step is unlikely to happen simply given the fiscal situation in which we find ourselves. Ten years ago the estimated cost of the addition of a single federal judge was \$1,000,000 per year, for life; it is undoubtedly higher now.¹²⁰ From the time of the Founding, the cost of the federal court system has been

¹¹⁴ *Id.* at 6890.

¹¹⁵ *Id.*

¹¹⁶ Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 10–13 (2007).

¹¹⁷ Newman, *supra* note 82, at 766.

¹¹⁸ Hellman, *supra* note 106, at 253; see Tjoflat, *supra* note 84.

¹¹⁹ See Reinhardt, *supra* note 84.

¹²⁰ See Tjoflat, *supra* note 84.

a motivation to keep it relatively small,¹²¹ and I somehow doubt that the current Congress would be particularly keen on extending the federal judiciary for precisely that reason.

As an attempt to promote true access to justice, it could even be counterproductive. Although in this Article I have discussed the consistent application of federal law as one task, it does in fact have two parts.¹²² First, it naturally entails an error-correction function, which would be eased in the short term by the addition of more judgeships. But in the long term, it would not because the increased number of judges would ultimately complicate the second task: consistently interpreting the law.¹²³ Adding judgeships creates instability in the law for a number of reasons, not least of which is the obvious one that it increases the possible permutations for any given three-judge panel.¹²⁴ It also decreases the collegiality of a court, a crucial aspect of promoting consistent and just outcomes through discussion and deliberation both on individual panels and among nonvoting members of the court.¹²⁵ As it is, the Ninth Circuit is, regrettably, too large to have full court en banc rehearing and must make do with a limited en banc panel of eleven randomly selected judges, which still does little to create true clarity and stability in the law.¹²⁶ As one of my colleagues on the Eleventh Circuit has convincingly argued, such a development will ultimately encourage more litigation, creating a never-ending cycle.¹²⁷ This inability to promote stability in the law and therefore in individual expectations of the law is what I consider to be the greatest threat to true access to justice in the federal court system, not anything the Supreme Court has done over the last few Terms.

¹²¹ Marcus & Wexler, *supra* note 50, at 19.

¹²² Diarmuid F. O'Scannlain, *Should the Ninth Circuit Be Saved*, 15 J.L. & POL. 415, 417–18 (1999).

¹²³ *Id.*

¹²⁴ Tjoflat, *supra* note 84.

¹²⁵ Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639 (2003); *see also* O'Scannlain, *supra* note 122, at 418 (“[C]onsistency of law in the appellate context requires an environment in which a reasonably small body of judges has the opportunity to sit frequently together, thereby enhancing the understanding of one another’s reasoning, decreasing the possibility of misinformation and misunderstandings, and increasing the tendency toward unanimous decisions.”).

¹²⁶ O'Scannlain, *supra* note 122, at 419; *see also* *A Conversation with Judge Harry T. Edwards*, 16 WASH. U. J.L. & POL'Y 61, 65 (2004) (discussing how the size of the Ninth Circuit makes “a viable process for rehearing cases en banc . . . very difficult” and that the current system can skew the results of cases); Tjoflat, *supra* note 84.

¹²⁷ Tjoflat, *supra* note 84.

IV

AN ONGOING DILEMMA: RECENT JURISPRUDENCE AND PROMOTING JUSTICE IN THE FUTURE

Indeed when reexamined through the lens of the principles discussed in Part I, I would assert that all of those decisions that I have seen criticized in the media¹²⁸ promote true access to justice through promoting consistent enforcement of federal law and through channeling disputes to the entity most capable of resolving them.

First, consider the Court's decision in *Arizona Christian School Tuition Organization v. Winn*, which dismissed for lack of standing a taxpayer's challenge to a state tax credit for donations to support scholarships for private schools.¹²⁹ Because the case sounded in the Establishment Clause, on its face, it seems to promote inconsistency. Under *Flast v. Cohen*, a taxpayer does have standing to challenge the expenditure of general treasury funds to support religious schools,¹³⁰ and as a matter of economic impact, tax credits and government spending are fundamentally equivalent.¹³¹ However, I suggest that *Winn* does promote consistency with the broader rule that taxpayers do not have a sufficiently particularized injury to challenge the manner in which the government spends his taxes or disposes of its property.¹³² That is, it is *Flast* that is an aberration. By limiting it to its facts, the Court has promoted consistency with other areas of law and has channeled those who wish to change tax policy to the forum with the legitimate authority to do so—the legislature.¹³³

¹²⁸ See, e.g., Jost, *supra* note 2.

¹²⁹ 131 S. Ct. 1436 (2011).

¹³⁰ 392 U.S. 83 (1968).

¹³¹ *Winn*, 131 S. Ct. at 1447 (conceding as much but explaining the difference as a matter of constitutional theory); see also NAT'L TAXPAYER ADVOCATE, 2010 ANNUAL REPORT TO CONGRESS (2010), available at <http://www.taxpolicycenter.org/events/Should-We-Put-the-Brakes-on-Tax-Breaks.cfm>. As such, the topic of standing did not even arise in the Ninth Circuit's considerations of the case. See generally *Winn v. Ariz. Christian Sch. Tuition Org.*, 586 F.3d 649 (9th Cir. 2009) (denying rehearing en banc based solely on the merits of the case).

¹³² *United States v. Richardson*, 418 U.S. 166, 188–89 (1974); see *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974); see also *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 599 (2007); *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 471 (1982); *Doremus v. Bd. of Ed. of Hawthorne*, 342 U.S. 429, 433 (1952); cf. *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923) (requiring the allegation to be that Congress violated a practically nonexistent limit on its power to tax and spend).

¹³³ Someday I hope that the Court will also choose to promote candor and end this endless litigation by simply overturning as has been advocated by certain Justices. See *Hein*, 551 U.S. at 618 (Scalia & Thomas, JJ., concurring).

Next, consider *Wal-Mart Stores, Inc. v. Dukes*, where the Court reminded plaintiffs that they cannot include individuals in their proposed class action unless they could affirmatively show that they shared a common injury.¹³⁴ The channeling effect in that case is not immediately obvious because the Court did not actually disallow anyone from suing; the Court merely stated that being female and working for Wal-Mart does not establish sufficient commonality to allow one to bring a class action.¹³⁵ However, allowing certification based upon the sort of statistical evidence presented in that case would have exacerbated the problems I discussed above, whereby people seeking change do so through the courts rather than Congress or through an administrative agency. Furthermore, recall that class actions are themselves an oddity of our system whereby certain plaintiffs are allowed to do what otherwise they are forbidden, namely to sue to enforce the rights of others.¹³⁶ As such, it is perfectly consistent with the complicated rules for institutional standing for the Court narrowly to construe the plaintiffs' rights to do so.¹³⁷

A more obvious example of this channeling effect is *J. McIntyre Machinery, Ltd. v. Nicaastro*, in which the Court held that a plaintiff who wishes to sue a British manufacturer for a defective product designed and produced in Britain, would have to do so in Britain, not in the state where the injury occurred.¹³⁸ I understand that it is more convenient for the plaintiff to sue in his home state, which also provides substantive benefits over other fora (particularly, broader views of strict liability theory, punitive damages, and the American

¹³⁴ 131 S. Ct. 2541, 2553 (2011) (requiring either demonstration of a biased testing procedure for hiring or "significant proof that an employer operated under a general policy of discrimination").

¹³⁵ *Id.* at 2557 (quoting Chief Judge Kozinski's dissent from denial of rehearing en banc).

¹³⁶ *Id.* at 2550 ("The class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700–01 (1979))).

¹³⁷ See Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. CHI. LEGAL F. 71, 74 (2003) ("[I]t is important to keep in mind a central fact often ignored in modern procedural scholarship: the class action was never designed to serve as a free-standing legal device for the purpose of 'doing justice,' nor is it a mechanism intended to serve as a roving policeman of corporate misdeeds or as a mechanism by which to redistribute wealth.").

¹³⁸ 131 S. Ct. 2780 (2011). This function is similarly served, albeit to a lesser extent in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011), when the Court held that if the plaintiff wished to sue an Ohio-based corporation for the design of a tire produced for foreign markets that caused an injury in a foreign country, he must do so either where the design was made or where the accident occurred.

rule whereby if he loses he will not be required to pay his opponents' legal bills).¹³⁹ But as defendants have precisely the opposite interests, we must find a tiebreaker unless we are going to adopt a view of justice that, once again, is entirely one-sided and results-driven. I agree with the Court that the tiebreaker is the due process concern involved with subjecting the defendant to suit in a distant forum which it has never entered. But even for those more dubious of that position, from a societal standpoint, Britain is the better forum. It is the location of the primary conduct—that is, the design and the manufacturing of the particular product—to be regulated. It is also the location of the majority of the witnesses.

Finally, consider *AT&T Mobility LLC v. Concepcion*, where the Court held that California law requiring any consumer arbitration clause to include a class-wide remedy was preempted by the Federal Arbitration Act.¹⁴⁰ As the importance of alternative dispute resolution has been well known for quite some time, I will not belabor it here. I note only that there are many circumstances in which avoiding the cost and stress of litigation has value not only to society but also to the parties who all too often have to continue to interact after the litigation is complete.¹⁴¹ Congress recognized this, and the *consumer confirmed* it by signing a contract with an arbitration clause.¹⁴² The Court's decision, therefore promoted justice through the consistent application of federal law by enforcing that decision.

¹³⁹ Piper Aircraft Co. v. Reyno, 454 U.S. 235, 252–53 & nn.18–19 (1981); see also Leah B. Moon, *Should They Stay or Should They Go: Applying the Forum Non Conveniens Doctrine to Foreign Plaintiffs Injured Abroad* in *Abad v. Bayer Corporation*, 5 SEVENTH CIRCUIT REV. 1, 3 (2009).

¹⁴⁰ 131 S. Ct. 1740 (2011) (discussing 9 U.S.C. § 2 (2006)).

¹⁴¹ Cf. Sarat, *supra* note 21, at 327. As such, I am always heartened when I see programs that require mandatory arbitration because the likelihood is that not only will the courts be less burdened, but also the parties will more quickly be able to move on with their lives. See Karen Engro, *A Changing Paradigm: Mandatory ADR Has Dramatically Reduced the Pendency Time of Cases in the Western District of Pennsylvania*, NAT'L L.J., Nov. 7, 2011, <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202524627002&slreturn=1>. Large businesses have already seen the value of this method of dispute resolution, to which one Justice has attributed the decrease in big civil cases. Pamela A. MacLean, *Justice Kennedy on Vanishing Big Civil Suits*, TRIAL INSIDER (Apr. 16, 2011), <http://www.trialinsider.com/?p=639>.

¹⁴² See, e.g., Jost, *supra* note 2 (“The decision in *AT&T v. Concepcion* gives businesses a roadmap to enforce arbitration clauses in preprinted consumer contracts that consign a defrauded customer to individual instead of classwide arbitration.”). It is likely true that the *Concepcions* had very little bargaining power to alter the form contract they were signing, but they did have the option of not signing one at all, even if they wanted a cell phone. See Press Release, *TracFone Takes Three of the Five Top Consumer Report Magazine Slots for No-Contract Cell Phone Service* (Dec. 15, 2011), <http://www>

If the concern among commentators is that no one will bring a lawsuit over a claim for the \$30.22 that the Concepcions were charged in sales tax on a nominally free phone,¹⁴³ then perhaps such a claim should not be brought. Litigation is a deadweight loss to society, and there are other ways to dissuade companies from engaging in repeated, albeit relatively minor, bad behavior. In particular, numerous administrative agencies are charged with enforcing extensive regulations that cover much of this conduct. Their expertise on a given topic allows them to review claims more effectively than any judge, no matter how diligent and hardworking. Of course, there are many instances when even after an administrative agency makes a decision, the litigant is still entitled to seek relief in court. Since the 1970s, there has even been a presumption, which was created by courts and which by judicial fiat has become almost irrebuttable, that there will be such review.¹⁴⁴ But query if such a presumption, at least as currently applied, is necessary.¹⁴⁵ It can also be quite harmful to the courts. As a result of very deferential standards of review,¹⁴⁶ the agency's decision will quite often be upheld, meaning that by applying an unwavering view that any agency decision *must* be reviewable in the federal courts, the workload of those courts is increased exponentially without adding much to the protection of the individual whose case is being reviewed.

As such, I would take a more narrow view of this presumption and recognize that Congress is constitutionally empowered to determine the extent of our review. If Congress concludes that it is necessary to preserve at least some judicial review of agency decisions, it can craft rules impossible to create by judicial fiat that pursue this goal without overburdening the federal courts. For example, Congress can create a certiorari system, whereby the courts of appeals have discretion to

.prnewswire.com/news-releases/tracfone-takes-three-of-the-five-top-consumer-report-magazine-slots-for-no-contract-cell-phone-service-135659323.html.

¹⁴³ *Concepcion*, 131 S. Ct. at 1744.

¹⁴⁴ See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971); see also *Webster v. Doe*, 486 U.S. 592 (1988).

¹⁴⁵ Members of my own court have used this presumption, or at least something like it, on numerous occasions to preserve their own jurisdiction over issues Congress has repeatedly sought to put beyond their purview. See, e.g., *Ramadan v. Gonzales*, 479 F.3d 646 (9th Cir. 2007) (per curiam) (defining an issue to be a question of law in order to preserve jurisdiction).

¹⁴⁶ See, e.g., 8 U.S.C. § 1252(d)(4)(B) (2006) (stating that in immigration law, “the administrative findings of fact are conclusive unless *any* reasonable adjudicator would be *compelled* to conclude to the contrary” (emphasis added)).

determine which agency decisions require further review.¹⁴⁷ Such a move would be particularly appropriate when the agency below has multiple layers of review, and I posit that it would not vary greatly from the screening system that we currently have. As it is, we choose which cases merit our greater attention, largely delegating the task of disposing of other cases along the same lines.¹⁴⁸ Adopting such a proposal would preserve the judicial review deemed necessary to keep agencies in line while promoting candor in the administration of the appeals process and ultimately justice through consistent application of federal law.

Needless to say, neither arbitration nor administrative action is a panacea for the problems of the federal courts. There are limits to what agencies may constitutionally decide, and unfortunately, the notion that justice is tied to the ability to sue is unlikely to leave the American psyche anytime soon.¹⁴⁹ This leaves us in a quandary: whether as a matter of ideological preference or practical necessity, we must recognize that federal courts cannot perform all of the roles currently expected of them. Therefore, as members of the legal profession, it is our responsibility to understand the limits of that system and to explore other means of pursuing justice.

The natural and obvious alternative is to promote more extensive use of state courts. Ordinarily, when Congress passes a law, the presumption is that it may be enforced in either federal or state court.¹⁵⁰ And barring some extraordinarily good reason, under current Supreme Court case law, a state *must* open its courts to

¹⁴⁷ O'Scannlain, *supra* note 97, at 478–80. This is a slightly narrower version of a proposal by Judge Newman to make all access to the federal courts in some specific types of cases within the discretion of the federal judges. See Newman, *supra* note 82.

¹⁴⁸ The story of the Supreme Court provides precedent for creating such a system, which did not exist until 1925 when it became no longer practical for the Court to decide every case before it on the merits. Judiciary Act of 1925, 43 Stat. 936 (1925). And I posit that our system of deciding one case and then screening others of similar issues bears considerable similarities to the Court's practice (however controversial) of granting, vacating, and remanding any number of cases previously held based upon a single precedential decision.

¹⁴⁹ See Sarat, *supra* note 21, at 329–35 (examining the perceived “hyperlexis” of the American people).

¹⁵⁰ This was the intent of the Framers, THE FEDERALIST NO. 82, *supra* note 35 (Alexander Hamilton), and it has long been enforced by the Court, see *Clafin v. Houseman*, 93 U.S. 130 (1876); see also *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 507–08 (1962). For an argument that this presumption should nonetheless be reversed because Congress all too often gives little consideration to jurisdictional allocation, see Martin H. Redish & John E. Muench, *Adjudication of Federal Causes of Action in State Court*, 76 MICH. L. REV. 311 (1976).

enforce those laws as interpreted by the federal courts.¹⁵¹ Yet still the preference of many attorneys and most academics would be to bring the suit in a federal court, which is commonly (but dubiously) presumed to be of higher quality.¹⁵² There has never been definitive proof that state courts are of materially inferior caliber to federal courts. Indeed, the very lack of that evidence has caused some simply to throw up their hands and assert that litigants should be able to choose either forum or even *both* fora.¹⁵³ For the reasons discussed above, we can no longer afford such luxury, assuming we ever could.

Moreover, the very insistence that despite any concrete evidence establishing such a difference in quality, federal courts are nonetheless the preferable forum underlines what is truly behind this assessment—an assumption that the federal court is better because it is more likely to find in favor of the party asserting a federal right.¹⁵⁴ As officers of the court, both lawyers and judges should not make such a presumption that so blatantly assumes the side of one litigant and so greatly denigrates the courts of sovereign States, “[u]pon [whom], equally with the courts of the Union, rests the obligation to guard, enforce, and protect every right granted or secured by the Constitution of the United States.”¹⁵⁵

Rather, if due to the inability to test the matter we must make a presumption, “the fitness and competency of [state] courts should be allowed in the utmost latitude.”¹⁵⁶ Though there may be a few exceptions, states are usually both willing and able to apply federal

¹⁵¹ *Testa v. Katt*, 330 U.S. 386 (1947).

¹⁵² I see this as the bigger implication of the statistic Professor Miller cites as evidence that the “litigation explosion” is overstated. See Miller, *supra* note 19.

¹⁵³ Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233, 256–57 (1988) (arguing that because trying to prove or disprove parity was a hopeless task, litigants should be allowed to choose their own forum); Barry Friedman, *Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts*, 104 COLUM. L. REV. 1211, 1220–22 (2004) (noting that inconsistent jurisdictional rules spawn useless litigation and advocating a “multijurisdictional” approach).

¹⁵⁴ Burt Neuborne, *Toward Procedural Parity in Constitutional Litigation*, 22 WM. & MARY L. REV. 725, 727 (1981) (describing with favor a definition of quality “based on an assumption that it is socially desirable to route controversies involving asserted constitutional rights of individuals to those judicial forums most likely to resolve them in favor of the individual”); see also Chemerinsky, *supra* note 153, at 257–58 (discussing such a definition with favor).

¹⁵⁵ *Robb v. Connolly*, 111 U.S. 624, 637 (1883).

¹⁵⁶ THE FEDERALIST NO. 81, *supra* note 35, at 444 (Alexander Hamilton).

law that has been coherently announced.¹⁵⁷ Instead when federal courts have disagreed with state courts on an issue of federal law, it has usually been based on either a difference of opinion regarding (1) the application of that law to a given set of facts or (2) the reconciliation of muddled federal law.¹⁵⁸ However, for many of the reasons discussed above, retaining federal jurisdiction over the maximum number of cases is unlikely to ameliorate these problems, and quite likely to exacerbate them.

In the first sort of situation, there is little more reason to think that the federal court will get it “right,” simply for want of sufficient time. For as I discussed above, at least at the appellate level, these sorts of cases are likely to be assigned to screening. In my circuit, this means that it will be worked up by a staff attorney and batched together with dozens, if not hundreds, of cases and given minimal attention by three judges. I somehow doubt that this is increasing the likelihood of getting the correct answer over assigning the case to the relevant state court.

In the second situation, assigning the additional cases to the federal courts will only decrease the level of clarity. Hamilton’s observation that “a voluminous code of laws is one of the inconveniences necessarily connected with the advantages of a free government,”¹⁵⁹ has proven ever more prescient as the country has grown more populous and more diverse. I have a copy of the 1934 edition of the *United States Code* in my office; it occupies about six inches of shelf space. Today’s code is in dozens of volumes and takes up an entire

¹⁵⁷ Michael E. Solimine, *Supreme Court Monitoring of State Courts in the Twenty-First Century*, 35 IND. L. REV. 335, 357–58 (2002); see also *id.* at 363 (“Contemporary evidence demonstrates that, for the most part, state courts are faithful agents of the Supreme Court in applying federal law.”). I would like to point out that we as federal courts do not have the power to enforce our edicts at all. As such, we rely on what one recent article termed the “culture of deference” to influence not only the state courts, Amanda Frost & Stefanie A. Lindquist, *Countering the Majoritarian Difficulty*, 96 VA. L. REV. 719 (2010), but also the federal Executive. There have been times in the past when that culture has failed as to both, but only the state courts’ recalcitrance is still presumed.

¹⁵⁸ Measuring this effect precisely is difficult because federal and state courts rarely sit on the same case. The most visible example is likely in the habeas context. Here, as the recent record of my court thoroughly demonstrates, federal courts routinely disagree with states on how to apply federal law, but those state courts rarely make a decision that “was contrary to, or involved an unreasonable application of, clearly established Federal law” or even that “resulted in a decision that was based on an unreasonable determination of the facts.” 28 U.S.C. § 2254(d)(1)–(2) (2006); see O’Sconnlain, *supra* note 91, at 1559–61 (discussing the high rate of reversal of Ninth Circuit habeas decisions under the Antiterrorism and Effective Death Penalty Act of 1996).

¹⁵⁹ THE FEDERALIST NO. 78, *supra* note 35, at 430 (Alexander Hamilton).

wall. *The Federal Reporter* went into its third series less than ten years ago, and it already has almost seven hundred volumes. Even accounting for the increased use of annotations, that is a lot of law to reconcile, and it is thus hardly shocking that the occasional state court comes to the wrong conclusion. But that situation will only worsen by increasing the number of authoritative federal decisions. So unless we are going to eliminate state courts' ability to apply federal law—something that would be nearly impossible unless the state courts were to go out of existence¹⁶⁰—the best way to promote the ability of state courts to apply federal law properly is to promote more consistency in federal law.

I take the stronger argument against shifting cases to the state courts to be that the state courts themselves are already overburdened. According to a recent study, there were over thirty million civil cases filed in American courts last year.¹⁶¹ The effects of those cases on the various state systems are troubling, but let's take a closer look. Of these approximately thirty million cases, only about four hundred thousand were filed in federal court.¹⁶² As such, shifting one hundred thousand cases from the federal courts would represent a twenty-five percent reduction in case load, but only increase the state court's load by one-third of one percent. And if the result would be more well-reasoned and consistent explications of what federal law requires, this would likely reduce the state courts' workload overall.

This is not something that we as courts can or should do on our own. Except in those instances when we create a private right of action where none had previously existed, we do not control our jurisdiction. However, Congress could accomplish this goal through a number of relatively simple methods. For example, it could reinstitute an amount in controversy requirement on general federal question jurisdiction, which existed until 1980.¹⁶³ As Judge Posner has pointed out, such a floor has the same effect as increasing the "price" for access to the federal courts, without actually requiring

¹⁶⁰ After all, even today there are numerous state cases where issues of federal law are crucial to the outcome but which remain in state courts because they are not matters properly included in a well-pleaded complaint. *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149 (1908).

¹⁶¹ REBECCA LOVE KOURLIS & DIRK OLIN, *REBUILDING JUSTICE: CIVIL COURTS IN JEOPARDY AND WHY YOU SHOULD CARE* (2011).

¹⁶² See DUFF, *supra* note 76.

¹⁶³ See 28 U.S.C. § 1331(a) (1976) ("The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$10,000"); see also Act of Dec. 1, 1980, Pub. L. No. 96-486, 94 Stat. 2369 (1980).

those seeking access to pay a higher fee.¹⁶⁴ Such a rule would be a nondiscriminatory way to limit the number of cases in the federal courts, allowing federal courts to develop a more consistent body of federal law. State courts, agencies, or arbitrators could then apply this more consistent body of law to the remaining cases.

CONCLUSION

“Access to Justice” is a multifaceted concept. As a federal judge, I cannot but be flattered that so many today seem to equate it to access to the federal judiciary. However, this notion is highly oversimplified. Making it easier for someone to sue in a federal court does not automatically increase his or her ability to access justice for any number of reasons. The simplest is that not everyone who feels himself or herself to be wronged is actually entitled to recover, and even if he or she is, “parties who need to rely on each other in the future are ill-served by a process that almost inevitably brands one ‘right’ and the other ‘wrong.’”¹⁶⁵ The more complex is that the federal courts simply do not have the capacity to take on such a burden. The Framers of the Constitution did not draft for it, and the Congress has failed to provide for it. As such, like it or not, the time has come to reexamine our assumptions about what it takes to promote access to justice within the federal courts.

¹⁶⁴ POSNER, *supra* note 58. In the alternative, Congress could specify that any new regulations, particularly those relating to safety, do not create a federal cause of action. These statutes could then be used as evidence of negligence in state courts or, more likely, as the bases for administrative enforcement without creating new claims to be enforced in the federal courts. Such specification is not technically necessary, but it would avoid unnecessary litigation as to whether or not the new regulation created a private right of action. Of course, the better solution would likely be for Congress to eschew such regulation entirely in order to avoid raising the specter of federal preemption of state remedies. See generally Catherine M. Sharkey, *Preemption by Preamble Federal Agencies and the Federalization of Tort Law*, 56 DEPAUL L. REV. 227 (2007).

¹⁶⁵ Sarat, *supra* note 21, at 327 (discussing the driving force behind the tort reform movement and the move toward alternative dispute resolution).

